

## An IP Lawyer Walks Into a Bar

### *Observations on Creativity in Cocktails*

MATTHEW SCHRUERS

Three measures of Gordon's, one of vodka, half a measure of Kina Lillet. Shake it very well until it's ice-cold, then add a large thin slice of lemon peel. . . . This drink's my own invention. I'm going to patent it when I can think of a good name.

So announces James Bond, having just made the acquaintance of CIA agent Felix Leiter, in Ian Fleming's inaugural Bond novel, *Casino Royale*.<sup>1</sup> While volumes could be filled debating whether or not Bond is wrong for shaking his martinis instead of stirring them, there's no doubt that he was wrong about the prospects of his intellectual creation. To the pleasure of cocktail-thieving supervillains everywhere, Mr. Bond is not going to be patenting anything. (Insert diabolical laughter here.) And it is not because for a spy, Bond seems to be terrible at keeping secrets, having disclosed his unprotected formula to his bartender and some foreign agent he only just met. No, he was out of luck in any event. Culinary recipes, and cocktails in particular, are one of various "negative" spaces of federal intellectual property law, where little statutory protection is available.<sup>2</sup>

Bond's particular innovation here may have been inspired by his *mis*-conception of the law, but the fact is that countless bartenders ("mixologists" being a more modern term) have been innovating for well over 200 years, producing new and interesting cocktail recipes over which they have no intellectual control. The orthodox theory of American intellectual property law struggles to explain this.<sup>3</sup>

Where protection is unavailable, the orthodox theory suggests that we ought to encounter an under-supply in the market. But we don't. A

growing abundance of recipes in print and online extends beyond the kitchen, to the bar. The last two decades have seen a renewed enthusiasm for cocktails, and much like “foodie culture” has lifted the restaurant sector, a wave of interest in craft cocktails has transformed the spirits industry. This includes a boom in cocktail recipes, both old and new. This resurgence has occurred notwithstanding the fact that the initial application of IP theory would suggest that it shouldn’t be the case.

This chapter explores why creativity occurs behind the bar, even in the absence of exclusive rights. It observes that the roots of modern cocktails can be found in medicine, a field readily associated with IP, and further, that IP is quite robust in other segments of the cocktail commodity chain, but that cocktails themselves are inherently unsuited for IP protection. It concludes by noting how different business models, incentives, and the mere fact of necessity have succeeded in driving cocktail innovation to where it is today.

### The Absence of Intellectual Property in Cocktails

One of the justifications for copyright and patent (and to a lesser degree, trademark) is the notion that ideas are public goods, distinguished by two characteristics: “non-rivalrousness” and “non-excludability.” The former term describes the fact that the good itself can be consumed in a non-competitive way—my use of a recipe doesn’t impair your ability to prepare the same thing. The latter term describes the fact that you cannot prevent others from possessing information once they know it. These aren’t new observations, of course. Thomas Jefferson noted them in his correspondence more than 200 years ago, and legal scholarship has acknowledged the public goods nature of ideas for decades.<sup>4</sup>

In short, the difficulty of fencing in an idea complicates a creator’s effort to fully appropriate the value of his intangible creation. Since everyone can free-ride once the creation is disclosed, the incentives to develop them are diminished, and the market would therefore be expected to under-supply intellectual endeavor. Thus, intellectual property rights to the rescue.

Yet in the case of recipes, intellectual property falls short. Federal courts, the U.S. Copyright Office, and copyright scholars have long interpreted section 102(b) of the Copyright Act, which prohibits copy-

rights on a “procedure” or “process,” to foreclose protection for lists of ingredients and steps. As the Copyright Office explains, protection may “extend to substantial literary expression—a description, explanation, or illustration, for example—that accompanies a recipe or formula or to a combination of recipes, as in a cookbook.”<sup>5</sup> Thus, a sufficiently literary narration for mixing a Manhattan may well acquire copyright protection, but the protection extends only to that specific written expression and not the steps it embodies.

Similarly, one might register a trademark for a particular cocktail’s name, but those rights extend only to the name in commerce, not the recipe to which it is applied. This Gosling’s Ltd. has done with respect to the phrase “Dark ‘N Stormy.” (According to the International Bartender’s Association, a Dark ‘N Stormy consists of 6 cl dark rum topped with 10 cl ginger beer, served over ice in a highball glass and garnished with lime.<sup>6</sup>)

When Gosling’s sought to enforce its mark, it produced no small amount of confusion in the media. Due to a poorly worded 2009 *New York Times* article, a wholly baffled article in *The Atlantic*, and a correspondingly muddled Wikipedia entry, it is frequently and incorrectly stated that Gosling’s has “trademarked the recipe.” It hasn’t. In fact, Gosling’s rights under the Lanham Act are quite limited. It can neither compel bartenders to call Gosling’s and ginger beer a “Dark ‘N Stormy,” nor can it foreclose others from serving other dark rums and ginger beer under another name.<sup>7</sup> At most, the registration—provided the mark hasn’t already gone generic—enables Gosling’s to restrict use of the phrase “Dark ‘N Stormy” in commerce.<sup>8</sup>

Gosling’s was not even a pioneer in seeking trademark protection for arbitrary cocktail names. As early as 1896, G.F. Heublin & Brothers secured a registration for the mark “Club Cocktails” in relation to its bottled beverages, and defended the mark vigorously in several legal tussles in the following years. It is worth noting that, like Gosling’s Dark ‘N Stormy registrations, Heublin’s mark appeared to contemplate pre-mixed, *bottled* concoctions, rather than freshly prepared cocktails. This suggests that these actions are a garden-variety application of consumer protection law: A buyer should be able to predict what is in the bottle.<sup>9</sup>

But, assuming that rum consumers also expect a *fresh* Dark ‘N Stormy to necessarily contain Gosling’s rum, and not some imposter, there is

some basis in trademark law for protecting that expectation too. In fact, just such a case was brought before the courts in 1936, *Compania Ron Bacardi S.A. v. Wivel Restaurant*, in which the distiller Bacardi sued New York hotel operators for serving Bacardi Cocktails that did not contain Bacardi's rum.<sup>10</sup> The rum producer argued that consumers expected its brand in the eponymous cocktail, whereas the defendants furnished affidavits from numerous bartenders, testifying that in their years of experience, a variety of rums were used in preparing a Bacardi Cocktail. Bacardi ultimately prevailed, with the court labeling a Bacardi-less Bacardi as "a subterfuge and a fraud."<sup>11</sup> Years later the company prevailed again in similar actions in Illinois.<sup>12</sup> And more recently, energy drink vendor Red Bull reportedly brought several successful actions against bars that used less expensive energy drinks when serving customers who requested a Red Bull and vodka.<sup>13</sup>

Arguably, the success of Bacardi and Red Bull as plaintiffs may be attributed to the fact they sued on their consumers' behalf as much as their own. These cases do not concern the *authorship* of the beverage, but rather its pedigree. Unlike the creator-oriented protections of copyright and patent, the direct beneficiaries of Bacardi's and Red Bull's trademark rights are the imbibing public. Gosling's efforts involving the Dark 'N Stormy are not entirely different; it was not interested in restricting use of the recipe, only in maintaining the association between its own spirit and the cocktail's name. Protecting a bar patron's expectations as to what goes in his glass is what a consumer protection statute should do. The outcomes in the few cases involving cocktail recipes are thus unsurprising, and are quite different from "recipe rights" as they protect consumers, not inventors.

So if neither copyright nor trademark grants rights over what one chooses to put in the glass, what might? To the extent one seeks exclusive rights in methods, processes, and procedures, that is the province of *patent* law. As it turns out, the U.S. Patent and Trademark Office classification system devotes an entire class of patents, Class 426, to "food" and (just to cover all the bases) "edible material." Nevertheless, the USPTO's website notes that "one of the most common questions the Office of Innovation Development receives is whether or not food recipes can be patented," and goes on to caution that most recipes will not rise to the level of novelty and non-obviousness required to secure

a patent.<sup>14</sup> Like the Copyright Office, the USPTO rains on the aspiring cocktail patentee's parade. Nowhere will federal law provide such rights.

Of course, an inventive mixologist might avail herself of *state* law protections for trade secrets (there being no federal private cause of action for trade secret misappropriation at the time of this writing). But most states that implement the Uniform Trade Secrets Act (UTSA) limit trade secret protection to that which is the “subject of efforts that are reasonable under the circumstances to maintain its secrecy.”<sup>15</sup> And trade secret law “does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering.”<sup>16</sup> Nor, as commentary to the UTSA observes, does trade secret law protect against a competitor observing the public use or public display of the secret,<sup>17</sup> which is particularly problematic for the practicing mixologist when many (if not most) cocktails are prepared for clientele and the world to see.

Picking up where federal law leaves off, the publishers of *Bartender Magazine* will issue you a “CocktailRight”<sup>TM</sup> certificate for a mere \$30. These certificates are offered online via a site urging readers to “copyright your original drink recipe.”<sup>18</sup> Needless to say, bragging rights that you were taken for \$30 are not the same as enforceable legal rights, but the availability of this dubious offer suggests that interest in exclusive cocktail rights exists.

## The IP-Centric History and Industry of the Cocktail

The absence of IP in cocktails is more notable than other zones of IP negative space for two reasons. First, since its medicinal roots, mixology has long been associated with the pursuit of exclusive rights; there are numerous examples of inventors seeking exclusive rights for mixed alcoholic products in the “pre-history” of cocktails. Second, the cocktail commodity chain is actually very robust with IP. It is only once one gets to the preparation stage that the protections end. This is not accidental. In spite of the history of mixed beverages and the pervasiveness of IP in getting cocktails from the fermentation process to your glass, the product itself is not only without protection, but in fact is inherently inhospitable to modern principles of IP.

The first reason that cocktails are an odd example of the IP's negative space is that the roots of cocktails may be found in what is today considered to be one of intellectual property's poster children: *pharmacology*.

While cocktail historians have pegged the birth of the word "cocktail" itself somewhere around the early 1800s,<sup>19</sup> the roots of the beverage go much further back, to the prescription of compound-bearing alcohols for restorative or medicinal purposes. This practice pre-dates the modern cocktail by well over 200 years,<sup>20</sup> to—according to one author—"a time when the boundaries between medicine and culture were more flexible and more porous."<sup>21</sup> As it turns out, these porous boundaries may have set medicine back, but not without considerably advancing the bibulous arts.

Ironically, one conspicuous example of the practice of administering blended alcohols as medicine is for the treatment of gout—arthritic inflammation caused by the deposit of uric acid in joints. Even in the seventeenth century, gout was recognized as being associated with a rich diet and alcohol consumption, which were largely luxuries at the time. Certain translations of a 1683 treatise on gout by the prominent seventeenth-century physician Thomas Sydenham (at times described as "the English Hippocrates") associate gout with lifestyles of "ease, voluptuousness, high living, and too free an use of wine and other spirituous liquors."<sup>22</sup>

For treatment, Sydenham's treatise prescribed a complex medicine prepared from an exotic range of plant matter and consumed by the patient. Of two recommended vehicles—an electuary, or ingredients mashed with alcohol into a paste, and a distilled liquid—the latter proved far more popular, and was widely emulated.<sup>23</sup> Over time, the astringent qualities of many such concoctions lent themselves to the name "bitters," and this characteristic is also likely the cause for another alcohol—often brandy or sherry—being adopted as a favored delivery vehicle (but not a very prudent one, at least for gout patients). Brandies and wines not only have the effect of masking astringency, but also have the effect of inviting patients to self-medicate.

Given that the prevailing medical alternatives at the time likely involved bleeding, the elite of the era might well have been willing to pay a premium for such a pleasing and non-invasive treatment. By the late seventeenth century, it was not uncommon to see apothecaries and

self-styled “doctors” hawking a variety of oils and elixirs to the public.<sup>24</sup> These products were not immune from passing-off by the competition; in 1680 the producer of another, unpatented medicine known as Daffy’s advertised to the public that it should beware of “diverse Persons” counterfeiting his product.<sup>25</sup>

These apothecary pirates likely compelled one Richard Stoughton to obtain a letter patent for his “Elixir Magnum Stomachii, or the Great Cordial Elixir,” in 1712.<sup>26</sup> As with many other patents at the time, no formula for the elixir was furnished in a specification, suggesting that challenges with enablement are not new to the patent system. Stoughton’s was so popular that even its trade dress acquired distinctiveness, with the phrase “stodgy as a Stoughton bottle” entering common parlance.<sup>27</sup> But whatever promotional value was furnished by Stoughton’s royal patent, it seems to have provided limited utility in the way of intellectual property protection. Purported recipes for the elixir soon appeared in print, including one in the 1739 *Compleat Housewife* located under “All Sorts of Cordial Waters,” in the company of “Dr. Burgel’s Antidote against the Plague” and “A Method to cure the Jaundice, which has been try’d with great Success.”<sup>28</sup>

In spite of, or perhaps due to widespread infringement, Stoughton’s product became one of the earliest recorded “patent medicines,” from which a long and distinctive tradition of quackery blossomed, tarnishing the name of patents in the process. Stoughton’s was likely popular insofar as it urged the patient to liberally self-administer, suggesting a substantial quantity mixed with water or wine, sugar, and brandy, “as often as you please.”<sup>29</sup> While the word “cocktail” was not applied, Stoughton’s prescribed combination of sugar, water, and bitters with a spirit meet the conventional definition for a cocktail.<sup>30</sup> Stoughton’s prescription for his patent medicine is thus an *ur*-cocktail, straddling the boundary between eras when one tipped a glass for health, versus a tippie “for health.”

Following Stoughton’s lead, patent medicines purporting to cure a diverse array of afflictions and dispositions proliferated on both sides of the Atlantic, until they were largely killed off by the food safety movement of the early twentieth century.<sup>31</sup> The purportedly medicinal properties of bitters were touted right up to the Pure Food and Drug Act of 1906. The labels for an impostor version of Angostura Aromatic bitters, for example, claimed to be “a cure for Liver Complaint, Dyspepsia, Fever

and Ague, Billious, Intermittent, and Remittent Fevers,” and, for good measure, “Asiatic Cholera and Yellow Fever.” These exaggerations ultimately caught up with the infringer, however, when the Second Circuit Court of Appeals ruled against them, citing unclean hands.<sup>32</sup>

Snake oils and quackery alone did not advance the cocktail. The practice of using potable alcohol as a medicine delivery vehicle gained additional prominence as the British Empire expanded. When British citizens abroad took to dissolving their bitter anti-malarial quinine powder in gin, they were planting the roots for the modern gin and quinine-bearing tonic.<sup>33</sup> The patented roots of the gin and tonic would not be complete without a lime, and the use of lime can also be linked to medicinal purposes. Citrus was long known to be useful in combating scurvy; it was popularized by medical trials conducted by naval surgeon James Lind in a 1753 treatise, but even Sydenham advocated the use of “anti-scorbutics” for gout sufferers in the hopes of alleviating joint pain.<sup>34</sup>

In December 1867 a Scottish merchant by the name of Lauchlan Rose secured Patent #3499, for “an improved mode of preserving vegetable juices,”<sup>35</sup> and marketed what is today known as Rose’s West Indies Lime Juice. Although perhaps intended for the domestic market, Rose’s patented process produced a shelf-stable, alcohol-free anti-scorbutic. Coincidentally, that same year the British government had mandated lime juice in merchant sailors’ daily rations, extending to civilian sailors a practice long followed by the navy.<sup>36</sup>

For policy reasons, Britain had for some time favored limes sourced from the British West Indies, instead of lemons from Europe. This preference for limes over lemons, and mandated rations for both civilian and naval sailors, cemented the use of the term “limey” to refer to British sailors. More importantly for our purposes, it ensured that mariners would mix their daily rum rations with lime juice. It also likely played a role in the fact that limes reigned in the rum and gin cocktails of the following era, including the Gimlet, which is customarily prepared with Rose’s Lime Juice. The choice of limes over lemons was less inspired from a medical perspective, however: as the lime contains a smaller quantity of ascorbic acid, scurvy reappeared on British ships in the late 1800s.<sup>37</sup>

In addition to the patent-driven origins of modern cocktails, those engaged in cocktail innovation might have looked to intellectual property to protect their creations for another reason: Most of a mixologist’s



inputs used in crafting a cocktail are themselves distinguished by various types of IP protection.

Base ingredients benefit from multiple types of protection. Whereas patents were once used to convey the imprimatur of the state upon the often-spurious quality of patent medicines, today's alcoholic products rely upon a mix of trademarks, collective marks, and, particularly in Europe, regulated geographical indications (GIs). Closely associated with the concept of *terroir*, GIs are recognized under both EU law and the TRIPS Agreement.<sup>38</sup> Plymouth gin, for example, until recently held both a trademark and geographical indication status. While the owners of the Plymouth, England-based Black Friars Distillery declined to renew the geographical indication in late 2014 due to the certification costs, this coexistence illustrates the considerable overlap that the two systems of protection provide. Internationally protected GIs are of relatively recent vintage, and before that time distillers and spirits vendors relied heavily on trademark. Long before the Lanham Act, for example, the manufacturer of Angostura was bringing infringement actions in multiple jurisdictions—as early as the 1870s.<sup>39</sup>

Further down the commodity chain, the many devices and utensils of the bartender's trade are or were similarly protected by a wealth of (now expired) patents for their innovations. In short, a bartender today works with ingredients protected by a range of marks, GIs, and certifications, using barware (once) protected by a variety of patents, and yet the actual product of his craft itself receives no protection.

This is particularly interesting given how differently the separate segments of the commodity chain fared during the early twentieth century. With the beginning of nearly 14 years of Prohibition in 1920, the profession of bartending was decimated. While it is often suggested that Prohibition actually promoted cocktail innovation because it was necessary to mask the abysmal quality of moonshine,<sup>40</sup> little evidence substantiates this contention. Customers of the day apparently favored straight liquor; it was not an era of cocktail innovation. In fact, innovation moved abroad. "The new drinks that did appear during this era were mostly fashioned in Europe, where at least a few American bartenders fled to pursue their careers," observes cocktail expert Gary Regan.<sup>41</sup> The global market for spirits themselves was largely unaffected, however, due to the fact that so much production occurred outside of the United States.

It is thus notable that post-Prohibition, a considerable wave of cocktail innovation occurs in the United States despite the bartending profession having been largely wiped out. The entire tiki genre, including the now-classic Mai Tais and Zombies, evolved in this era, while the base spirits and hardware remained largely the same. Even today, the three-piece “martini” shaker in the average bar is likely a dead ringer for E.J. Hauck’s 1884 combination shaker,<sup>42</sup> and most so-called Hawthorne strainers today are difficult to distinguish from Charles Lindley’s 1889 patented “Julep-strainer.”<sup>43</sup> To the extent innovation is occurring further up the commodity chain, such as new formulations of lost bitters,<sup>44</sup> or barrel aged gin, for example, these products are responding to demand from cocktail enthusiasts, rather than the other way around.<sup>45</sup>

The absence of protection for cocktails is no historical accident; even more so than food, cocktails are inherently hostile to modern principles of intellectual property. It has been argued that in the culinary context, plating may constitute a form of fixation wherein the dish itself is the work.<sup>46</sup> While there is no reason that some presentations of food could not constitute works of visual art, courts may be disinclined to accept what could present a roundabout way of securing recipe rights, which federal courts have so far refused to allow.<sup>47</sup> As a district court judge recently noted in the improbably captioned *Tomaydo-Tomahhdo, LLC v. Vozary*, “Certainly, plaintiffs cannot be suggesting that somehow the copyright [in a recipe book] prevents defendants from serving chicken salad sandwiches.”<sup>48</sup> Other scholars have noted that trade dress claims may also provide protection for certain distinctive presentations of food.<sup>49</sup>

But to the extent that any narrow form of copyright protection or trade dress might be afforded to food preparation, this would be an impossibility in the case of most cocktails. The options for presenting liquids are far more limited than presenting solids. Moreover, the presentations of many conventional cocktails are actually prescribed by semi-formal standard. The International Bartenders Association specifies precise proportions, glassware, and garnish for dozens of classic and common cocktails.<sup>50</sup> A bartender who departs too far from these prescriptions might be thought to not know the craft.

Even setting aside the standards, the number of discrete permutations that are actually palatable are finite. Cocktail confusion is already

a problem. Numerous cocktails do business under the same name, or are but one ingredient away from another cocktail. A Bronx, for example, is also a Minnehaha; add bitters and it becomes an Income Tax and also perhaps a Maurice; remove the orange juice and it becomes a Perfect Martini. Similarly, a Ford cocktail also travels under the name Caprice and several others, all of which are essentially variations on the classic martini.<sup>51</sup> Gary Regan's 2003 opus, *The Joy of Mixology*, devotes 30 pages to an extended taxonomy of cocktails that in numerous entries differ only by a single ingredient, or merely the garnish.<sup>52</sup> Were these cocktails the result of "infringement," or independent creation? In most cases, we'll never know.

From the copyright perspective, doctrines like merger and *scènes à faire* thus constrain the extent to which any particular articulation of a mixological idea can acquire protection. From the patent perspective, the obviousness of potential combinations arguably rules out the vast number of potential cocktails. As the Supreme Court reminded an overzealous Federal Circuit in *KSR International v. Teleflex*, a "patent for a combination which only unites old elements with no change in their respective functions . . . obviously withdraws what is already known into the field of its monopoly and diminishes the resources available to skillful men."<sup>53</sup> A base spirit paired with a fortified wine, bitter, or juice describes a large majority of cocktails. What protection for a cocktail recipe could be granted that would not merely "unite old elements" functioning in their usual manner? While a few certain practices and processes in cocktail preparation might be amenable to patenting, these are the exceptions to a broadly applicable rule.

### Explaining Cocktail Innovation

It would seem remarkable that, despite having wiped out our domestic industry a century ago, and having no IP protection to incentivize creativity, there is nevertheless a considerable amount of innovation in the mixological arts. Why is this? Several reasons help explain how innovation thrives in this particular negative space.

As noted, many of the innovations associated with cocktails today were born out of necessity. As discussed before, today's bitters harken back to the nostrums and elixirs formulated by seventeenth-century

apothecaries. These products traded for a half-century before they first obtained patent protection, because physicians, or the nearest equivalent, needed to treat patients, and alcohol provided the most stable vehicle for their ministrations. While it is true that many apothecaries relied on trade secrecy, numerous physicians also disclosed their secrets in treatises.

The need to dilute bitter medicinal alcohols in something more palatable led to the ancient practice of dissolving them in wine, such that we can recognize the primogenitors of modern cocktails by the early eighteenth century. In the same fashion, the necessity of warding off malaria helped construct the modern gin and tonic, as English sailors and colonials took to dissolving quinine in their gin. And the fortuitous union of both gin and rum with lime is similarly associated with the need to ward off scurvy. These innovations were not the result of the carrot of incentive, but the stick of necessity.

Of course, cocktails today are a thoroughly recreational undertaking, and one needs to look further to understand more contemporary cocktail innovation. Various choices regarding business models help to explain the phenomenon.

As Raustiala and Sprigman point out in *The Knockoff Economy*, a cocktail is not a product, but a service; “even more than cuisine, [they] are a performance as much as a product.” There’s a reason your barman is far likelier than your chef to have a handlebar mustache; his job is both food preparer and entertainer. The difficulty in selling non-scarce ideas leads vendors to focus on selling that which is naturally scarce: access, labor, and skill. Anyone who has ever paid for a round of drinks knows that it is considerably cheaper to buy the stuff and serve oneself. The premium, of course, pays for a comfortable or convenient venue, where one hopefully receives skilled service.<sup>54</sup> As Raustiala and Sprigman observe, “you are not really buying a drink, you are renting a bar stool.”

This strategy, referred to by technology pundit and TechDirt editor Mike Masnick as “sell the scarcity,” focuses on monetizing inherently scarce resources instead of attempting to control non-excludable intangibles.<sup>55</sup> Yet this alone does not necessarily explain why cocktails are so freely disclosed. After all, one may opt against affirmatively seeking protection, but that doesn’t explain affirmatively disclosing what might

in some cases be maintained as a trade secret. It is one thing to decline protection, but another to affirmatively publicize one's creation. Why then are cocktail innovations not only unprotected, but publicized?

One reason why recipes abound is that recipes sell the product. It should come as no surprise that to the extent legal tussles have occurred over cocktails, they generally involve not individual bartenders but distillers and distributors, who are concerned not with authorship, but sales. Although the existence of the Bacardi Cocktail may cause heartburn for Bacardi's trademark counsel, Bacardi's marketing department likely regards it as a blessing since the recipe drives demand for the liquor.

More recent trends in spirits marketing focus less on the use of a particular name for a given cocktail, and marketers instead devote attention to producing a variety of cocktails that serve as a vehicle for the product. This intellectual exercise is undertaken at a loss, in order to promote the spirit. The practice is as old as the recipe on the back of the soup can, but distillers have adapted for the Internet age, with numerous spirits' Twitter handles churning out an endless supply of recipes.

Many spirits brands today also employ "brand ambassadors." Although the marketing industry now often casually uses this term to refer to any prominent endorser and even one's own customers,<sup>56</sup> a major subset of brand ambassadors in the spirits industry are practicing mixologists who have gained renown, perhaps by winning competitions. These individuals are engaged to popularize the relevant spirit through events and promotions, and in particular finding ways to showcase their product—including by inventing recipes. In a sense, these brand ambassadors represent a form of market disruption, insofar as the brands are giving away cocktail innovation in order to promote their product.<sup>57</sup>

We see this kind of disruption elsewhere: It is not uncommon for disruptive innovators in the technology sector to provide a complementary product in the course of offering their own. Whether it involves open-source distributors providing free software to sustain a business model involving support and customization, or Internet portals providing free productivity software to gain viewers, most producers resent their product being commoditized by the competition. The free distribution of cocktail recipes is no different. As one industry player complained, "brand ambassadors are ruining it . . . In no other creative field do you

find people who are so easily able to insert themselves into the scene.” Notably, this is not a complaint about piracy; it is about competition. More people “inserting themselves into the scene” is what the orthodox theory of IP suggests we should see in a *high* IP environment, yet this complaint suggests that a low IP environment is encouraging creativity all too well, at least from the perspective of some market participants.

In addition to promoting the product, recipes may also promote the inventor. Since Sydenham disclosed his formulae in his *Treatise on Gout* in the seventeenth century, experts have disclosed mixological secrets to the public in order to advance their professional interests. Possessing the idea, of course, is not the same as being capable in the execution, and it is on this difference that an expert can trade. A mixologist is not unlike an academic scholar, in the sense that she gives her intellectual product away largely for free, in the hopes that the reputational gain it produces will provide better employment opportunities.

For this reason, we would expect to see the development of strong attribution norms, similar to the strong attribution norms associated with high-end cuisine.<sup>58</sup> In the case of spirits writing, we often see similar attention to attribution. Here, it is common for cocktails both new and old to be credited either to their creators, or in some cases, to their re-discoverers.<sup>59</sup> This is not to say that attribution to other inventors is common in drinking establishments; such an acknowledgment on a menu is rare; just as it is similarly uncommon with cuisine. (After all, if you’re paying a premium, you don’t expect to be served someone else’s recipes.) But because credit is provided in the context of writing, reporting, and reviews—where consumers are likelier to make decisions about whether to patronize an establishment—innovative activity is nevertheless rewarded.

## Conclusion

One response to this discussion might be a counterfactual one: that mixological innovation is actually undersupplied by the market, and that the cocktail craft would be doing even better if cocktails were in fact protectable. But for the failure to provide adequate and effective protection behind the bar, this argument goes, we would have accomplished the mixological moonshot by now. This hypothesis can be raised in many

of the areas of IP negative space. But it would be wrong to give it much weight; one can equally contend the reverse: that there would be the same amount of innovation in areas where IP exists today, were that protection only repealed.

In sum, what conventional IP theory explains poorly, the incentives of the marketplace seem to explain rather well. Cocktails are an area where we see innovation in the absence of protection in large part because there are external motivators to innovate. Along with other areas of IP negative space, this should be cause for reflection. Any area of regulation should be able to survive a cost-benefit analysis, and intellectual property is no exception to the rule. Having seen that simple necessity, business incentives, and personal self-interest, rather than exclusive rights, are driving one industry to creative activity, we can't ignore that these forces may drive creativity in other comparable sectors as well.

#### NOTES

The arguments presented here are Matthew Schruers' alone, and should not be attributed to his employer, academic institution, or bartender. Some of the ideas discussed here were previously presented in a blog post, "So, An IP Lawyer Walks Into a Bar," Disruptive Competition Project (Sept. 6, 2013), <http://www.project-disco.org>

- 1 Ian Fleming, *Casino Royale* (London: Penguin, 2003), 36.
- 2 See generally Kal Raustiala and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," *Virginia Law Review* 92 (2006): 1764.
- 3 *Ibid.*, 1691.
- 4 Mark A. Lemley, "Property, Intellectual Property, and Free Riding," *Texas Law Review* 83 (2005): 1031.
- 5 Christopher J. Buccafusco, "On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?" *Cardozo Arts & Entertainment Law Journal* 24 (2007), 1124–1125. See also U.S. Copyright Office, "Recipes, FL-122" (2010), <http://copyright.gov>.
- 6 See International Bartenders Association, *IBA Sixty Years On* (2011), 53. While some IBA publications specify Gosling's Black Seal, IBA's *website* conspicuously does not, at the time of publishing. It is entirely possible that Gosling's naked public licensing and the probable widespread unauthorized use of the cocktail's name could result in the Dark 'N Stormy mark being ruled generic.
- 7 See Jonathan Miles, "The Right Stuff (By Law)," *New York Times* (July 2, 2009), <http://www.nytimes.com>; see also Chantal Martineau, "The Era of Copyrighted Cocktails?," *The Atlantic* (Aug. 31, 2010), <http://www.theatlantic.com/health>; see

also “Dark ‘n Stormy,” *Wikipedia*, <http://en.wikipedia.org/wiki>. In fact, Gosling’s specifically abandoned an application for “a prepared alcoholic cocktail consisting of rum and ginger beer” in 1986 (Gosling’s trademark counsel apparently caring little for garnish), before securing various USPTO-issued registrations, including for “pre-mixed alcoholic beverage, namely rum and ginger beer” beginning in 1991—specimens of which are canned, and none of which specify a precise recipe. See <http://tmsearch.uspto.gov/>.

- 8 More importantly from Gosling’s point of view, its rights in the registration extend to the use of name regardless of the recipe. Accordingly, ill-informed bartenders serving other beverages under the name “Dark ‘N Stormy” need to be policed, notwithstanding that there’s no rum in the equation.
- 9 See *Ex Parte S.C. Herbst Importing Co.*, U.S. Patent Office Official Gazette 124 (Washington, DC: U.S. Government, 1906), 2178. See also *Heublein v. Adams*, 125 F. 782 (D. Mass 1903); *In re Boston Wine & Spirits Co.*, 39 App. D.C. 421 (1912).
- 10 “Justice Examines His Club Bartender: Takes Opportunity of Having Him on Stand to Find Out What Goes Into His Drinks,” *New York Times* (Apr. 28, 1936), 44. Although not authoritative from a trademark perspective, it is interesting to observe that the contemporary International Bartender’s Association standard specifies Bacardi for this recipe. See, e.g., IBA, *Sixty Years*, 42.
- 11 “Cocktail Must Live Up to Name: Court Decides Drink Should Contain Product Implied by Label,” *New York Times* (Apr. 29, 1936), 23 (reported at *Compania Ron Bacardi S.A. v. Wivel Restaurant*, 250 A.D. 837 (N.Y. Sup. Ct. App. Div. 1937)).
- 12 *Bacardi & Co. Ltd. v. Bacardi Mfg. Jewelers Co.*, 174 U.S. Patent Quarterly 284 (N.D. Ill. 1972) (noting actions).
- 13 Gene Quinn, “Red Bull Wins Trademark Lawsuit,” *IPWatchdog* (May 2, 2008), <http://www.ipwatchdog.com>.
- 14 U.S. Patent & Trademark Office, “Can Recipes Be Patented?” <http://www.uspto.gov>.
- 15 *Uniform Trade Secrets Act with 1985 Amendments* (Chicago: National Conference of Commissioners on Uniform State Laws, 1985), Section 1(4)(ii).
- 16 *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).
- 17 *Uniform Trade Secrets Act with 1985 Amendments*, Section 1, *commentary*.
- 18 Foley Publishing Corp., *Bartender Magazine*, <http://www.bartender.com>, <http://www.cocktailright.com/example.html>. (The author’s request for comment from this publication went unanswered.)
- 19 Wondrich, *Imbibe*, 175 (citing 1803 New Hampshire newspaper); David Wondrich, *Punch: The Delights (and Dangers) of the Flowing Bowl* (New York: Penguin Group, 2010), 22 (citing 1798 London newspaper).
- 20 David Wondrich, *Imbibe!* (New York: Penguin Group, 2007), 170–176. Wondrich points out that the Roman emperor Claudius is recorded as having been advised by his physician to consume various fruit and plant substances dissolved in sweet wine. *Ibid.*, 169.
- 21 Richard Barnett, “Bitter medicine: gout and the birth of the cocktail,” *The Lancet* 379 (London: 2012): 1385.



- 22 Ibid. (quoting from “A Treatise on Gout,” reprinted in John Swan, trans., *The Whole Works of Dr. Thomas Sydenham* (London: 1742), 418).
- 23 Ibid., 435–437.
- 24 George B. Griffenhagen and James H. Young, *Old English Patent Medicines in America* (Washington, DC: Smithsonian Institution, 1959), 156–161.
- 25 Ibid.
- 26 Office of the Commissioner of Patents (UK), *Patents for Inventions. Abridgements of Specifications relating to Medicine, Surgery, and Dentistry, 1620–1866* (London: 1872), 2.
- 27 George B. Griffenhagen and Mary Bogard, *History of Drug Containers and Their Labels* (Madison, WI: American Institute of the History of Pharmacy, 1999), 72.
- 28 The recipe, which consists of Seville orange rind, gentian, and cochineal infused into brandy, lacks the 22 ingredients which Stoughton professed his product contained. Other recipes add various other ingredients, many of which are toxic. For example, Walter Kilner, *A Compendium of Modern Pharmacy and Druggists’ Formulary* (Springfield, IL, 1887), 495.
- 29 Griffenhagen and Young, *Patent Medicines*, 157–161, 166–167.
- 30 Wondrich, *Imbibe*, 172–177.
- 31 Brad Thomas Parsons, *Bitters: A Spirited History of a Classic Cure-All* (Berkeley, CA: Random House, 2011), 19.
- 32 *Siebert v. Abbott*, 72 Hun. 243 (Sup. Ct. N.Y. 1893); *Siebert v. Gandolfi*, 149 F. 100, 104 (2d Cir. 1907).
- 33 Kal Raustiala, “The Imperial Cocktail,” *Slate.com* (Aug. 28, 2013), <http://www.slate.com>.
- 34 Jeremy Hugh Baron, “Sailors’ scurvy before and after James Lind—A Reassessment,” *Nutritional Reviews* 67 (2009): 316. See Swan, *The Whole Works of Sydenham*, 436.
- 35 Office of the Commissioner of Patents (UK), *Chronological Index of Patents Applied for and Patents Granted for the Year 1867* (London: 1868), 239.
- 36 Janet Zimmerman, “Any Other Name,” *eGullet Forums* (Nov. 23, 2009), <http://forums.egullet.org>.
- 37 Baron, *Sailors’ scurvy*, 326.
- 38 See also Justin Hughes, “Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications,” *Hastings Law Journal* 58 (2006): 301.
- 39 E.g., *Siebert v. Findlater*, [1878] 7 Ch. D. 801; *Siebert v. Abbott*, 61 Md. 276 (1884); *Siebert v. Abbott*, 72 Hun. 243 (Sup. Ct. N.Y. 1893); *A. Bauer & Co. v. Siebert*, 120 F. 81 (7th Cir. 1903); *Siebert v. Gandolfi*, 149 F. 100, 104 (2d Cir. 1907).
- 40 E.g., Ted Haigh, *Vintage Spirits and Forgotten Cocktails* (New York: Quarry Books, 2009), 75.
- 41 Gary Regan, *The Joy of Mixology* (New York: Random House, 2003), 29–30.
- 42 U.S. Patent No. 300,867 (issued June 24, 1884).
- 43 U.S. Patent No. 404,204 (issued May 28, 1889).

- 44 Angostura recently introduced its only new product, orange bitters, in 180 years. Parsons, *Bitters*, 26.
- 45 M. Carrie Allan, “Gin goes dark: At what point does aging render it unrecognizable?” *Washington Post* (Jan. 14, 2014), <http://wapo.st>.
- 46 Buccafusco, *Sauces*, 1131.
- 47 E.g., *Publications Int’l Ltd. v. Meredith Corp.*, 88 F.3d 473, 480 (7th Cir. 1996).
- 48 *Tomaydo-Tomahhdo, LLC v. Vozary*, 2015 U.S. Dist. LEXIS 10532 (N.D. Ohio 2015) at <https://scholar.google.com>.
- 49 J. Austin Broussard, “An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation,” *Vanderbilt Journal of Entertainment & Technology Law* 10 (2008): 693–694.
- 50 See generally IBA, *Sixty Years*.
- 51 Ted Haigh, *Vintage Spirits*, 137, 166–167.
- 52 Regan, *Joy of Mixology*, 166–195.
- 53 *KSR International v. Teleflex Inc.*, 550 U.S. 398, 127 S. Ct. 1727, 1739 (2007) (quoting *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 152 (1950)).
- 54 Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (New York: Oxford University Press, 2012), 91–92.
- 55 Mike Masnick, “More Artists Recognizing the New Business Model: Sell the Scarcity,” *TechDirt* (May 20, 2009), <https://www.techdirt.com>.
- 56 Todd Wasserman, “How to Turn Fans into Brand Ambassadors,” *Mashable* (July 13, 2011), <http://mashable.com>.
- 57 Robert Simonson, “Bartending, a Dead End No Longer,” *New York Times* (Aug. 11, 2010), D3; Jeff Gordinier, “The Sorcerer of Shaken and Stirred,” *New York Times* (Mar. 16, 2011), D5.
- 58 Buccafusco, *Sauces*, 1153–1154.
- 59 “30 of the Best Cocktails Invented Since 2000,” *Difford’s Guide for Discerning Drinkers* (July 17, 2013), <http://www.diffordsguide.com>. See also Parsons, *Bitters*, 146 (noting rediscovery of Prohibition-era Seelbach Cocktail); Regan, *Joy of Mixology*, 45–47.